Office - Supreme Court, U.S.
FILED
NOV 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1839

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

vs.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE MINNESOTA SUPREME COURT

REPLY BRIEF OF APPELLANT

Of Counsel:
NORTON L. ARMOUR
425 Portland Avenue
Minneapolis, Minn. 55488
FAEGRE & BENSON
1300 Northwestern
Bank Building
Minneapolis, Minn. 55402

JOHN D. FRENCH
LAWRENCE C. BROWN*
JAMES B. LOKEN
JOHN P. BORGER
1300 Northwestern
Bank Building
Minneapolis, Minn. 55402
Telephone: (612) 371-5300
Attorneys for Appellant
*Counsel of Record

224-7633 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7633

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Note as to Abbreviations	iv
Introduction	1
Argument	2
I. The State's "Content-Related" Argument Does Not Save the Challenged Use Tax	2
A. The State's "Content-Related" Argument Has No Support in Tax Cases Involving First Amendment Issues	2
B. Minnesota's Use Tax on Paper and Ink Unconstitutionally Impedes the Free Flow of Information	6
II. A "Balancing of Interests" Standard of Review Is Not Applicable to a Direct Tax on Freedom of the Press	9
III. The Challenged Use Tax Departs From Broad Sales and Use Tax Principles to the Detriment of a Small Group of Publishers of Large-Circulation Minnesota Newspapers	12
A. The Challenged Use Tax Repeatedly Discriminates Against a Few Publishers of Large-Circulation Minnesota Newspapers	12
B. The Constitutionality of the Challenged Use Tax Is Determined by its Effect or Consequence, and Not by its Perceived Neutrality or the Absence of Punitive Legislative Intent	15
Conclusion	17

TABLE OF AUTHORITIES

Page

Cases:

Arthur v. Moller, 97 U.S. 365 (1878) 8

Buckley v. Valeo, 424 U.S. 1 (1976) 4

Cammarano v. United States, 358 U.S. 498 (1959) . 3

Citizens Against Rent Control v. City of Berkeley, 50 U.S.L.W. 4071 (1981) 4, 11

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 4

Grosjean v. American Press Co., 297 U.S. 233 (1936) ..... *passim*

Houchins v. KQED, Inc., 438 U.S. 1 (1976) 16

Interstate Circuit v. United States, 306 U.S. 208 (1939) 13

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 15

Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) 13, 16

Murdock v. Pennsylvania, 319 U.S. 104 (1943) 5

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 10, 16

Pittsburgh Press Company v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973) 16

Pott v. Arthur, 104 U.S. 735 (1882) 8

Speiser v. Randall, 357 U.S. 513 (1958) 3

Taxation with Representation of Washington v. Regan, 676 F.2d 715 (D.C. Cir.) (*en banc*) *probable jurisdiction noted*, No. 81-2338, 51 U.S.L.W. 3253 (Oct. 4, 1982) 3

Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) 11

United States v. 12 200-Ft. Reels, 413 U.S. 123 (1972) 7

United States v. O'Brien, 391 U.S. 367 (1968) 10, 16

Page

Statutes and Regulations:

19 U.S.C.A. §1202 (Tariff Schedule 2, Part 4) 8

Tariff Act of 1922, Ch. 356, 42 United States Statutes at Large 931 (1923) 8

Publications and Miscellaneous:

Appendix B, Appellees' Brief, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) 7

C. Collet, *History of the Taxes on Knowledge* (1899) 6

L. Ellis, *Print Paper Pendulum: Group Pressures and the Price of Newsprint* (1948) *reproduced in* L. Ellis, *Newsprint: Producers, Publishers, Political Pressures* (1960) 7, 8, 9

T. May, *Constitutional History of England* (1891) .. 6

Report of the Federal Trade Commission on the News-Print Paper Industry (June 13, 1917) 8

F. Siebert, *Freedom of the Press in England 1476-1776* (1952) 5, 6

Stewart, *John Lennox and the* Greenock Newsclout: *A Fight Against the Taxes on Knowledge*, 15 Scottish Historical Rev. 332 (1918) 6

Supplies for a Free Press, A Preliminary Report on Newsprint by the Subcommittee on Newsprint of the Select Committee on Small Business, United States Senate, 82nd Congress, 1st Session (1951) . 5, 7

Taxes on Knowledge, Edinburgh Review, October, 1835 at 126 6

I. Thomas, *The History of Printing in America* (M. McCorison, ed., 1970, from 2d ed. 1874) 6

L. Weeks, *A History of Paper Manufacturing in the United States 1690-1916* (1916) 7

NOTE AS TO ABBREVIATIONS

Throughout this Brief, appellant will use these abbreviations:

"A—" refers to pages in the Appendix to Jurisdictional Statement.

"JA—" refers to pages in the Joint Appendix.

"Motion at —" refers to pages in the Appellee's Motion to Dismiss.

"State's Brief at —" refers to pages in the Brief of Appellee Minnesota Commissioner of Revenue.

"ACLU-MCLU-MCAC Brief at—" refers to pages in the Brief of the American Civil Liberties Union, the Minnesota Civil Liberties Union and the Minnesota Coalition Against Censorship, *amici curiae*.

"Knight-Ridder/ANPA Brief at—" refers to pages in the Brief of Knight-Ridder Newspapers, Inc. and the American Newspaper Publishers Association as *amici curiae*.

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

NO. 81-1839

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

vs.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE MINNESOTA SUPREME COURT

REPLY BRIEF OF APPELLANT

INTRODUCTION

Since submitting its Motion to Dismiss, the State has developed two entirely new arguments for sustaining the constitutionality of the challenged use tax:

First, the State contends that the challenged use tax is not "content-related": it does not expressly tax the exercise of free press rights because it does not directly af-

fect the subject matter that a publisher of a Minnesota newspaper subjected to the tax may publish.

Second, the State contends that the challenged use tax should be reviewed under a "balancing of interests" standard, rather than the "strict scrutiny" standard which the Minnesota Supreme Court recognized to be proper. Applying this relaxed standard of review, the State argues that the tax is constitutional because it is an exercise of the State's power to tax irrespective of the consequence or effect of the tax.

The State also reasserts its argument that the challenged use tax is textually neutral, and thus nondiscriminatory. From this, the State attempts to demonstrate that the tax is constitutional, notwithstanding its proven discriminatory effect upon only a dozen or so publishers of Minnesota's largest-circulation daily newspapers.

Star Tribune will address these arguments in order.

ARGUMENT

I. The State's "Content-Related" Argument Does Not Save the Challenged Use Tax.

A. The State's "Content-Related" Argument Has No Support in Tax Cases Involving First Amendment Issues.

The State devotes considerable effort to establishing and repeating two undisputed, but irrelevant, points: the State must raise revenue, and the challenged use tax addresses that need. (*See, e.g.*, State's Brief at 9, 13, 28-30, 37-40, 45-46.) The State recognizes, as it must, that its power to impose taxes

is restricted by the Federal Constitution, including the First Amendment. (*See* State's Brief at 15-18.) However, it seeks to avoid any meaningful restrictions on its taxing power by contending that, unless a tax is expressly "content-related," the First Amendment requires only a "balancing of interests" analysis in which the State's need for revenue inevitably is paramount.

The State has not cited any decision which limits the First Amendment's prohibitions on the states to "content-related" taxes, and there are none. Star Tribune is unaware of any tax which has been imposed directly upon communication based upon the content of that communication, no doubt because such a crude attempt to impose a "tax on content" is so obviously improper that it is unlikely to survive consideration by any sensitive legislative or executive body.[1]

To reduce the First Amendment's freedom of the press protection in the taxation area to a prohibition of only "content-related" taxes would be to ignore what this Court has long recognized: that the First Amendment is concerned with protecting the quantity of speech and its manner of dissemination, as well as its specific content. For example, in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), this Court struck

---

[1] In a few cases, the government has granted or denied special exemptions or deductions from general taxes based either upon the specific content of a communication, *e.g., Speiser v. Randall*, 357 U.S. 513 (1958), or upon the general nature of communicative activity, *e.g., Cammarano v. United States*, 358 U.S. 498 (1959); *Taxation with Representation of Washington v. Regan*, 676 F.2d 715 (D.C. Cir.) (*en banc*), *probable jurisdiction noted*, No. 81-2338, 51 U.S.L.W. 3253 (Oct. 4, 1982). Nondiscriminatory denials of deductions from general taxes raise different constitutional issues than do even nondiscriminatory direct taxes on protected activity. (*See* Brief of Appellant at 27-28.)

down a tax which interfered with the circulation of *all* information, not just information with specified content. More recently, this Court has repeatedly invalidated broad restrictions on the volume or extent of communication, despite the fact that those restrictions, at least on their face, did not discriminate based upon the specific content of communication. *Citizens Against Rent Control v. City of Berkeley*, 50 U.S.L.W. 4071 (1981); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1, 39-51 (1976). As Chief Justice Burger elaborated in his concurring opinion in *Bellotti*:

> There is no fundamental distinction between expression and dissemination. The liberty encompassed by the Press Clause . . . merited special mention simply because it had been more often the object of official restraints. (435 U.S. at 800.)

The State attempts to trivialize Star Tribune's First Amendment rights in this case by arguing that "the commercial purchase of paper and ink" is not a fundamental right. (State's Brief at 35.) But the State consciously ignores the use to which the taxed paper and ink is put. Every means by which newspapers can increase the flow of information to the public—increasing pages, increasing frequency of publication and increasing circulation—requires increased consumption of paper and ink, the two commodities essential to publishing a newspaper which are subjected to the challenged use tax.

The First Amendment right at stake here is the right to communicate.[2]

A state may not raise revenue by imposing a charge on the exercise of a constitutional right, even if it does so in a "nondiscriminatory" fashion by imposing the same charge on other activities which do not enjoy constitutional protection. *Murdock v. Pennsylvania*, 319 U.S. 105, 113-115 (1943). The State here concedes that taxes directly tied to circulation levels are forbidden by *Grosjean*, even if they are not "content-related." (*See* State's Brief at 15-31.) Likewise, the early, odious taxes on knowledge were not "content-related"; they restricted the dissemination of speech of supporters and critics of the government alike. *See, e.g.*, F. Siebert, *Freedom of the Press in England 1476-1776* 317 (1952). Thus, the State's argument that the First Amendment is concerned solely with taxes on the "content" of speech finds no support in the prior decisions of this Court and flies in the face of centuries of Anglo-American free speech experience.

---

[2] If "revenue is the very lifeblood of any government's operation" (State's Brief at 28), paper and ink are no less vital to newspapers. As a Senate Subcommittee chaired by the Honorable Hubert H. Humphrey concluded in 1951:

> [T]here is no substitute for newsprint in the production of a newspaper. . . . Without newsprint a modern newspaper cannot be published. As Congressman McKinnon testified, "I do not think there is any doubt in anyone's mind that traditional freedom of the press—and, by that, I mean a free opportunity for anyone to engage in the publishing business—is dependent upon an ample supply of newsprint at a reasonable price level."
>
> . . . . The evidence establishes that newsprint shortage and cost have both contributed to newspaper deaths.

Supplies for a Free Press, A Preliminary Report on Newsprint by the Subcommittee on Newsprint of the Select Committee on Small Business, United States Senate, 82nd Congress, 1st Session 2, 6 (1951) (hereinafter "*Supplies*").

B. Minnesota's Use Tax on Paper and Ink Unconstitutionally Impedes the Free Flow of Information.

The State suggests that Star Tribune has invented taxes on paper as the third category of prohibited "taxes on knowledge." (State's Brief at 20-21.) The State's suggestion simply ignores history. The English duty on paper was denounced as a tax on knowledge and eventually was repealed precisely because it impeded the free flow of information.[3] Pre-Revolutionary colonial taxes on paper provoked intense opposition because they interfered with freedom of the press; these paper taxes were short-lived. (*See* ACLU-MCLU-MCAC Brief at 27-30.) American opposition to the various taxes on knowledge continued unabated after independence was achieved.[4]

The absence of any discussion in *Grosjean* of the paper tax as a "tax on knowledge" is hardly surprising. The Louisiana tax there at issue had nothing to do with paper; it taxed advertisements and, effectively, circulation. The attention of this Court, and of the parties, understandably was directed else-

---

[3] *See, e.g.*, 2 C. Collet, *History of the Taxes on Knowledge* 134 (1899); 2 T. May, *Constitutional History of England* 215 (1891); F. Siebert, *supra*, at 312, 322; Stewart, *John Lennox and the* Greenock Newsclout: *A Fight Against the Taxes on Knowledge*, 15 Scottish Historical Rev. 322, 322 (1918); *Taxes on Knowledge*, Edinburgh Review, October, 1835, at 126, 126, 130n*.

[4] *See, e.g.*, I. Thomas, *The History of Printing in America* 279 (M. McCorison, ed., 1970, from 2d ed. 1874) ("The legislature of Massachusetts had in March, 1785, passed an 'act, imposing duties on licensed vellum, parchment and paper.' This act laid a duty of two-thirds of a penny on newspapers, and a penny on almanacs, which were to be stamped. The British stamp act of 1765, violently opposed in the colonies, rendered this act so unpopular from its very name, that the legislature was induced to repeal it before it went into operation."); Brief of Appellant at 19-20.

where, although paper taxes were mentioned in the publishers' extended historical discussion in Appendix B, Appellees' Brief at 49-53, 56-58, *Grosjean*.

Finally, the State argues that taxes on paper cannot be unconstitutional because Congress formerly imposed an import duty on paper. This argument is unsound. "Import restrictions . . . rest on different considerations and different rules of constitutional law from domestic regulations." *United States v. 12 200-Ft. Reels*, 413 U.S. 123, 125 (1972). The justification for the import duty on newsprint rested on the need to encourage an important domestic industry.[5] On the other hand, the challenged use tax does not encourage the domestic production of newsprint. As a "revenue-raising measure," and as a burden upon free speech, the challenged use tax is indistinguishable from the early taxes on knowledge which, in England, retarded the establishment of mass-circulation news-

[5] The Revolutionary War cut off imports of paper from England, creating an acute paper famine. *Supplies*, *supra* at 1. In response, 80 to 90 paper mills were established in the United States by the war's end. *Id.* at 8. The first tariff act protected the fledgling paper manufacturing industry, which was recognized as an important national asset. *Id.*; L. Weeks, *A History of Paper Manufacturing in the United States 1690-1916* 102 (1916). By 1810, there were more than 200 American paper mills. *Supplies*, *supra* at 8. Eventually, the production of newsprint shifted to Canada, for unrelated reasons. L. Ellis, *Print Paper Pendulum: Group Pressures and the Price of Newsprint* 5-6 (1948), *reproduced in* L. Ellis, *Newsprint: Producers, Publishers, Political Pressures* (1960). When the import duty actually became a financial hardship for publishers, it was soon lifted. Modifications in import duties were suggested on occasion as ways to encourage the production of newsprint in the United States. *See, e.g.*, *Supplies*, *supra* at 18, items 24 and 26.

papers, and, in America, are prohibited by the First Amendment. (*See* Brief of Appellant at 24.)

The State's argument regarding import duties on paper is today merely academic. Newsprint is specifically exempted from any import tax, 19 U.S.C.A. § 1202 (Tariff Schedule 2, Part 4), and has been so since 1922. Tariff Act of 1922, ch. 356, 42 United States Statutes at Large 931 (1923). No duty has been paid since 1913 on imports of newsprint from Canada, the primary supplier of newsprint to American publishers. *Report of the Federal Trade Commission on the News-Print Paper Industry* 45 (June 13, 1917) (hereinafter "*Report*").

Paper which could be used in the production of newspapers was subject to an import duty prior to 1913. *Id.* The duty was mentioned in the decisions of this Court construing the statutory language of other tariff provisions. *E.g., Pott v. Arthur*, 104 U.S. 735 (1882); *Arthur v. Moller*, 97 U.S. 365 (1878). However, no decision of this Court addresses the constitutionality of the import duty on newsprint, and history suggests that its constitutionality should not be lightly assumed.

Newspaper publishers had little reason to challenge the import duty's constitutionality in the courts prior to its legislative exemption, because they generally had access to ample supplies of cheap domestic newsprint. Ellis, *Print Paper Pendulum, supra* at 15. Little or no newsprint was imported prior to 1897. *Id.* at 14. In 1901, the United States imported less than $1,000 of newsprint, and in 1906, less than $65,000. *Report, supra* at 43.

When the import duty began to create financial difficulties for newspaper publishers, it was attacked as an unwarranted

interference with freedom of the press. In 1908, William Jennings Bryan's presidential platform included a plank asserting:

> Existing duties have given to the manufacturers of paper a shelter behind which they have organized combinations to raise the price of pulp and paper, *thus imposing a tax upon the spread of knowledge.* We demand the immediate repeal of the tariff on pulp, print paper, lumber timber, and logs, and that these articles be placed upon the free list.

Ellis, *Print Paper Pendulum, supra* at 45 (emphasis added). When all significant import duties were removed in 1913, the American Newspaper Publishers Association commented: "The days for a tax upon knowledge are gone." *Id.* at 88-89.

II. A "Balancing of Interests" Standard of Review Is Not Applicable to a Direct Tax on Freedom of the Press.

The State contends that the challenged use tax is to be measured by a "balancing of interests" standard of review rather than the higher "strict scrutiny" standard. (State's Brief at 24-28).[6] This argument must be rejected.

---

[6] The State heretofore consistently maintained that, while the Minnesota Supreme Court "expressly adopted and correctly applied the strict scrutiny standard of review for this case," that court "went further than it was required to go," and that the "'any rational basis' test is *the* correct standard for review." (Motion at 16) (emphasis added). This was the State's justification for its counsel's statement to the Minnesota Supreme Court that "it would be difficult to uphold . . . [the challenged use tax] . . . under the strict scrutiny standard of review." (*Id.* at n.7.)

Of course, this Court's opinion in *Grosjean* is quite inconsistent with the State's proposed standard of review. The form of the tax at issue in *Grosjean*, coupled with the historical significance of "taxes on knowledge" in the enactment of the First Amendment, compelled this Court's conclusion of unconstitutionality without an analysis of the statute's discriminatory features. *Grosjean*, 297 U.S. at 244-51. Star Tribune's initial First Amendment challenge is presented on the same analytical plane, which might be termed a *per se* rule of invalidity for direct taxes on knowledge. (*See* Brief of Appellant at 17-25.) At that level of analysis, the tax at issue is read with a focus upon its "effect" and "direct tendency"; if those factors demonstrate an actual or inevitable restraint on the press, the tax is unconstitutional without regard to its discriminatory features. *Grosjean*, 297 U.S. at 244-45.

Should this Court agree with the State's argument that the broad *Grosjean* approach is inappropriate here, however, the question becomes what standard of review is appropriate for determining the First Amendment validity of the patently discriminatory features of the challenged use tax. In support of its proposed "balancing of interests" standard, the State cites decisions of this Court involving First Amendment challenges to regulatory statutes or ordinances, not direct taxes on the press. (State's Brief at 25-27.) While *Grosjean*—a tax case—did not discuss standard of review, this Court's subsequent readings of *Grosjean* do not support applying a standard of review of any lesser magnitude than strict or exacting scrutiny to the discriminatory features of the challenged use tax. *See United States v. O'Brien*, 391 U.S. 367, 377, 384-86 (1968); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) (also recognizing the distinction between statutes "im-

posing taxes upon rather than prohibiting particular activity . . . [citing *Grosjean*]").[7]

When any tax measure is challenged, a state invariably will defend on the basis of its interest in raising revenue, just as the State has done here. Given the multiplicity of revenue sources available to states and the singularity of a state's interest in raising revenue, when a state tax interferes with the exercise of First Amendment rights, the state must be required to demonstrate a compelling interest to derive revenue *from* the protected First Amendment activity subject to the tax if First Amendment rights are to be afforded adequate protection. (*See* Knight-Ridder/ANPA Brief at 12-13.)

Simply put, the concerns expressed by this Court in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 602-03 (1953), about the vital role played by the press in American society and the reduced numbers of daily newspapers, are even more justified today than they were almost 30 years ago. To apply a more relaxed "balancing of interests" standard of review to the challenged use tax would critically dilute the First Amendment. When a state tax on protected activity is challenged on the grounds that it is discriminatory or excessively restrictive in its impact upon the press, the "strict scrutiny" standard of review is imperative.

---

[7] When a state seeks to regulate conduct through the exercise of its powers other than its taxing power, there are bound to be numerous and varied state interests to be served. In such situations, a "balancing of interests" standard arguably *may* be suitable to accommodate such legitimate state interests which do not unnecessarily impinge upon protected First Amendment activity. Nonetheless, this Court recently has expressed a contrary view. *See Citizens Against Rent Control v. City of Berkeley*, 50 U.S.L.W. at 4073. In contrast, regulation *per se* by the exercise of a state's power to tax is relatively infrequent.

III. The Challenged Use Tax Departs From Broad Sales and Use Tax Principles to the Detriment of a Small Group of Publishers of Large-Circulation Minnesota Newspapers.

A. The Challenged Use Tax Repeatedly Discriminates Against a Few Publishers of Large-Circulation Minnesota Newspapers.

The State repeatedly ignores the actual effect of the challenged use tax, asserting that the broad definition of "publication" encompasses more than just newspapers (State's Brief at 2-3, 10, 33, 39), and that the challenged use tax is part of an overall sales and use tax measure (State's Brief at 2-3, 7, 9-14, 25, 29, 31, 37-38). The evidence of record concerning the actual payment of the tax during the years in question, however, establishes that there were only 11 taxpaying publishers of Minnesota's large-circulation daily newspapers in 1974, and 13 such publishers in 1975. (JA-23-26.) To echo the State's own language, "no evidence whatsoever has been presented to show" (State's Brief at 4) that the challenged use tax was paid by any other newspaper publishers, or by even one publisher of "magazines, advertising supplements, shoppers guides, house organs, trade and professional journals and serially issued comic books" (State's Brief at 10).[8]

The State, which possesses records of all use tax payments and could have produced additional evidence had such existed,

---

[8] During oral argument before the Minnesota Supreme Court, the State's counsel asserted that "there are in fact large companies in the State who, for purposes of advertising circulars and so forth, do purchase large amounts of paper and ink and do exceed the one hundred thousand-dollar exemption." (A-32.) There is absolutely no evidentiary support in the record for this assertion.

neither challenged, nor expanded upon, the evidentiary record presented by Star Tribune. By its failure to produce evidence within its control, the State is deemed to concede that any such evidence is unfavorable to the State's position—namely, that Star Tribune's evidence is correct that *only* a few publishers of Minnesota's large-circulation daily newspapers paid the challenged use tax.[9]

The history and language of the challenged use tax further demonstrate that a small group of newspaper publishers has been "singled out for special taxation," in the words of *Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 184 (1946) (State's Brief at 18). For example:

1. *"Publications" was the* only *previously exempt sales and use tax category adversely affected by the 1971 legislation.* (*See* Brief of Appellant at 4-5.)

2. *The challenged use tax is the* only *section of Minnesota's sales and use tax laws which expressly prohibits taxpayers from claiming the benefit of separate, otherwise applicable exemptions.* The challenged use tax imposes a tax on paper and ink consumed by publications "notwithstanding any other provisions of sections 297A.01 to 297A.44 to the contrary." (A-84.) There is no similar

[9] In its Brief, the State observes that the "record does not reflect the actual impact of the tax on other 'publications' besides newspapers. . . ." (State's Brief at 4.) Given the State's clear self-interest in meeting Star Tribune's arguments, there can be no doubt whatever that, if the challenged use tax had an actual impact on other "publications," the State would have established that fact by record evidence. *Cf. Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. . . . Silence then becomes evidence of the most convincing character.")

"notwithstanding any other provisions" clause anywhere in Minnesota's sales and use tax laws. (A-70-90.)

3. *The challenged use tax is the* only *section of Minnesota's sales and use tax laws which creates categories based upon the dollar amounts of prior purchases.* (*See* Brief of Appellant at 25-26, 42-46.)

4. *The challenged use tax is the* only *section of Minnesota's sales and use tax laws which imposes a greater burden on local businesses than on out-of-state merchants doing business in Minnesota.* (*See* Brief of Appellant at 46-47.) The State's response to Star Tribune's argument is that it "simply has no power to impose its use tax on the foreign purchase of paper and ink by reason of the due process clause of the fourteenth amendment." (State's Brief at 41.) This response ignores the fact that the State claims the power to impose a sales tax on all publications sold in Minnesota (State's Brief at 38-40), a taxing alternative which arguably would have equalized the burden between domestic and out-of-state publishers with respect to Minnesota sales.[10] The State's due process dilemma is solely of its own creation, resulting from a unique and unexplained departure from the State's otherwise-universal approach of taxing only final products, and not component parts.

5. *The challenged use tax is the* only *section of Minnesota's sales and use tax laws which imposes a tax upon component parts, rather than upon final products.* (*See* Brief of Appellant at 47-49.)

---

[10] Star Tribune maintains that a tax on the sale of newspapers would be unconstitutional. (*See* Brief of Appellant at 34-41.)

Despite more than 18 pages of discussion (State's Brief at 32-50), the State never explains why *any* of this peculiar discriminatory treatment is *necessary* to accomplish any governmental purpose, much less a compelling one. The State's position essentially is that, where taxes are concerned, it has broad discretion to do as it pleases and it need not justify its classifications, even when those arbitrary classifications raise a strong inference of discriminatory intent. However, when a tax imperils First Amendment rights, the State's discretion is restricted. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 & n.3 (1973).

B. The Constitutionality of the Challenged Use Tax Is Determined by its Effect or Consequence, and Not by its Perceived Textual Neutrality or the Absence of Punitive Intent.

The State attempts to combine the perceived textual neutrality of the challenged use tax and the absence of express record evidence that it was the product of punitive legislative intent to demonstrate the constitutionality of the tax and avoid *Grosjean*. (State's Brief at 9-13, 15-20, 30, 42-50.)

The State's argument on textual neutrality is without substance or support. Drafters of tax statutes are fully capable of creating the appearance of equal treatment. But that is not the sole focal point of constitutional analysis. For example, Louisiana's unconstitutional license tax on newspaper advertising at issue in *Grosjean* was no more, and no less, textually neutral or non-discriminatory than is the challenged use tax here at issue. The dominant focus in *Grosjean* was upon the Louisiana statute's *effect* "to curtail the amount of revenue realized from advertising" and its *direct tendency* "to restrict

circulation." (297 U.S. at 244-45.) Artful legislative draftsmanship is no barrier to this Court's analysis of the actual or inevitable effect of the challenged use tax.

The State's reading of *Grosjean* would limit its holding of unconstitutionality to taxes which are the direct product of punitive legislative intent aimed at newspapers. (State's Brief at 17-20.) The State supports its position by citing one passage from *Grosjean* (297 U.S. at 250), and incomplete passages from three subsequent decisions of this Court distinguishing *Grosjean*.[11] The State simply ignores this Court's explanations of *Grosjean* in *United States v. O'Brien*, 391 U.S. at 384-85 and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 461-62, that the effect or consequence of a tax, and not the underlying legislative motive or intent, is the focal point upon which its constitutionality is to be judged when confronted with a freedom of press challenge. *See United States v. O'Brien*, 391 U.S. at 383 (". . . under settled principles the purpose of Congress . . . is not a basis for declaring . . . legislation unconstitutional").

To adopt the State's skewed reading of *Grosjean* would present a dangerous threat to freedom of the press. The effect or consequence of a tax is far more easily and reliably discerned than matters as elusive as legislative motive or intent. (*See* Brief of Appellant at 22-25; ACLU-MCLU-MCAC Brief at 55-60.)

---

[11] *Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 184 (1946); *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 383 (1973); and *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978).

CONCLUSION

The January 5, 1982, judgment of the Minnesota Supreme Court should be reversed for the reasons set forth in this Reply Brief and in Star Tribune's prior written submissions to this Court. Star Tribune suggests that this Court should base its decision here, as it did in *Grosjean*, on broad freedom of the press grounds. Only such a reaffirmation of *Grosjean*'s principles will serve the two desirable goals of fully protecting the press from unconstitutional taxation of its expressive activity and of affording the states a clear guideline in the future exercise of their taxing power.

Respectfully submitted,

JOHN D. FRENCH
LAWRENCE C. BROWN*
JAMES B. LOKEN
JOHN P. BORGER
1300 Northwestern
Bank Building
Minneapolis, Minn. 55402
Telephone: (612) 371-5300
Attorneys for Appellant
*Counsel of Record

Of Counsel:
NORTON L. ARMOUR
425 Portland Avenue
Minneapolis, Minn. 55488
FAEGRE & BENSON
1300 Northwestern
Bank Building
Minneapolis, Minn. 55402